89-177

No. _____

Supreme Court, U.S.
FILED
JUL 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

AETNA CASUALTY & SURETY COMPANY,

Petitioner,

v.

CHARLES R. McMASTER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

GARY M. ZWAIN*
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QUESTION PRESENTED

Whether the state court's exercise of jurisdiction under the Louisiana Worker's Compensation Law, LRS 23:1021, *et seq.*, contravenes the exclusive jurisdiction of the longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901, et seq.

LIST OF PARTIES

Rule 28.1 Listing of Corporate Petitioner:

Aetna Casualty & Surety Co., Inc.

Rule 21.1(b) Listing of Parties:

All parties are listed in the caption.

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AETNA CASUALTY & SURETY COMPANY,

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v.

CHARLES R. McMASTER, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner, Aetna Casualty & Surety Company, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Louisiana denying petitioner's petition for a writ of certiorari, filed April 28, 1989.

OPINIONS BELOW

The order of the District Court for the Parish of St. John, filed January 3, 1989, denying petitioner's declinatory exception of lack of subject matter jurisdiction, styled *"Charles R. McMaster, Jr. v. Robert Miller and Associates, Aetna Casualty & Surety Company,"* is unreported and

appears as Appendix A. The order of the Louisiana Court of Appeals for the Fifth Circuit, filed March 21, 1989, denying petitioner's petition for writ of certiorari is unreported and appears as Appendix B. The order of the Louisiana Supreme Court dated April 28, 1989, denying petitioner's petition for writ of certiorari is unreported and appears as Appendix C.

JURISDICTION

Respondent, Charles R. McMaster, Jr., filed an action against Robert Miller and Associates and Aetna Casualty & Surety Company[1], as its workers' compensation carrier, asserting a claim for injuries allegedly sustained during his employ with Robert Miller and Associates. Originally, Mr. McMaster sought relief under the Longshoremen and Harbor Workers' Compensation Act. He was denied benefits by an Administrative Law Judge in a decision and order rendered on May 19, 1988, which is attached as Appendix D. On May 24, 1988, respondent filed a Notice of Appeal with the Benefits Review Board, which is attached as Appendix E. He filed a petition for worker's compensation benefits pursuant to the Louisiana Workers' Compensation Law on September 15, 1988, which is attached as Appendix F. The appeal before the Benefits Review Board is still pending.

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[1] Pursuant to the Louisiana Direct Action Statute, LRS 22:655, Aetna Casualty & Surety Company may be sued directly as Robert Miller's worker's compensation carrier.

Petitioner, Aetna Casualty & Surety Company, filed a declinatory exception of lack of subject matter jurisdiction in the district court of the Parish of St. John asserting that the Longshoremen and Harbor Workers' Compensation Act had exclusive jurisdiction over respondent's cause of action. When the district court denied the motion, petitioner applied for a writ of certiorari in the Louisiana Court of Appeals for the Fifth Circuit, which was denied on March 21, 1989. Petitioner then filed a petition for writ of certiorari in the Louisiana Supreme Court asserting the exclusive jurisdiction of the Longshoremen and Harbor Workers' Compensation Act over this cause of action. On April 28, 1989, the Louisiana Supreme Court denied the petition.

The Louisiana Supreme Court was required to grant the petition for writ of certiorari pursuant to the Longshoremen and Harbor Workers' Compensation Act and the United States Constitution, Article 3 Section 2. Accordingly, the Louisiana Supreme Court's decision is final within the meaning of 28 U.S.C. Section 1257 and the court has jurisdiction pursuant to 28 U.S.C. Section 1257.

PERTINENT CONSTITUTIONAL PROVISION AND STATUTES

1. Article 3, Section 2:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and councils; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States

should be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming land under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects.

2. The Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. Section 903 (a):

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death arises from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customly used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

3. 33 U.S.C. Section 902 (3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoreman operations, and any harbor worker, including a ship repairman, ship builder, and ship breaker, . . .

4. 33 U.S.C. Section 905 (a):

> The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at

law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 904 of this title.

STATEMENT OF THE CASE

Respondent, Charles R. McMaster, Jr., began working in 1985 cleaning barges and offering pre-inspection to the barge owners. Respondent contracted with a number of different barge lines from August, 1985 until March, 1986. Respondent and his employees would travel to an empty barge, clean it, inspect it, and make minor repairs. On the date of respondent's injury, March 25, 1986, respondent was cleaning a barge for Robert Miller and Associates at the Mississippi River Grain Elevator in Myrtle Grove, Louisiana. The barge was located on the Mississippi River. Respondent had just finished cleaning the barge when he attempted to climb out of the barge by using a ladder. The rope allegedly broke from the ladder and the ladder slipped out from under him causing him to fall into the barge.

Claiming to be an employee of Robert Miller and Associates, respondent filed a claim for compensation benefits under the Longshoremen and Harbor Workers' Compensation Act (hereinafter referred to as LHWCA),

33 U.S.C. Section 901, *et seq.*, on April 23, 1986. A formal hearing was conducted on July 22, 1988. After reviewing the evidence and hearing the testimony of the witnesses, the Administrative ~~Law~~ Judge denied benefits. Respondent is currently seeking review by the U. S. Department of Labor's Benefits Review Board.

On September 15, 1988, plaintiff filed suit in the 40th Judicial District Court for the Parish of St. John the Baptist seeking relief under the Louisiana Workers' Compensation Law. Louisiana Revised Statute 23:1021, *et seq.* Petitioner, Aetna Casualty & Surety Company, filed a declinatory exception of lack of subject matter jurisdiction on November 3, 1988. The exception was heard by the court on December 13, 1988 and in a judgment rendered on January 3, 1989, the district court ruled that there were sufficient reasons to presume respondent was an employee of Robert Miller and Associates and the exception was dismissed. Aetna Casualty & Surety Company was given until February 28, 1989 to apply for writs. An application for supervisory writs was timely filed in the Fifth Circuit Court of Appeals. In a decision rendered March 21, 1989, the Court of Appeals denied writs citing *Logan v. Louisiana Dock Co., Inc.*, 541 So.2d 182 (La. 1989) as its authority. On April 28, 1989, the Louisiana Supreme Court denied a petition for writ of certiorari citing that the instant case was governed by *Logan v. Louisiana Dock Co., Inc.*, supra. Petitioner now seeks a writ of certiorari from the U. S. Supreme Court on the basis that the Longshoremen and Harbor Workers' Compensation Act provides exclusive jurisdiction for respondent's cause of action and that his state court suit is therefore barred.

REASONS FOR GRANTING THE WRIT

A. Preliminary Statement:

A writ of certiorari should issue to review the decision of the lower court for three reasons:

First, the Longshoremen and Harbor Workers' Compensation Act has exclusive jurisdiction over respondent's cause of action;

Second, the Louisiana Supreme Court decision of *Logan v. Louisiana Dock Co., Inc.*, 541 So. 2d 182 (La. 1989) is directly in conflict with decisions of a federal appellate court and the United States Constitution[2]; and

Third, the LHWCA has preempted state law completely in this area so as to preclude state court exercise of jurisdiction.

B. The Longshoremen and Harbor Workers' Compensation Act Has Exclusive Jurisdiction Over Respondent's Cause of Action:

Respondent, a ship repairer, sought redress first under the provisions of the LHWCA. It was only after he was denied benefits in the federal forum that he sought to assert his alleged rights under the Louisiana Workers' Compensation Laws. Petitioner contends that the federal jurisdiction of the LHWCA is exclusive and there is no concurrent jurisdiction over this cause of action. A federal remedy was provided, respondent availed himself of

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[2] A writ of certiorari to the Louisiana Supreme Court has been sought in this case, and was filed on July 13, 1989.

that remedy, and now seeks to convert his federal claim into a state claim for worker's compensation benefits.

Article 3, Section 2 of the United States Constitution provides that federal courts have power to hear all cases of admiralty and maritime jurisdiction. The United States Supreme Court, in *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L.Ed. 1086 (1917), held that provisions of the Constitution prohibited the application of state compensation statutes to longshoremen injured on the seaward side of the line between the land and the sea. Subsequent to *Jensen*, Congress enacted the LHWCA to provide a dependable compensation scheme to protect those workers injured over navigable waters who were rendered ineligible for state worker's compensation benefits. Although state courts and legislators have sought to expand the remedies available to its workers, the Supreme Court has not seen fit to overrule *Jensen* in the 71 years it has been law.

Whether or not the LHWCA allows for concurrent jurisdiction between the federal and state courts has been debated since the passage of the act. Concurrent jurisdiction between the federal and state courts exists for employees who occupy a shadowy area where it is difficult to determine whether state or federal law should apply. In areas where the courts have found a "twilight zone" or "maritime but local" activity, the employee has been permitted to elect his remedy under either a state worker's comp statute or the LHWCA. See *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S. Ct. 89, 66 L.Ed. 210 (1921); *Grant Smith - Porter Ship Co. v. Rhode*, 257 U.S. 469, 42 S. Ct. 157, 66 L.Ed. 321 (1922); *Millers Indemnity Underwriters v. Braud*, 270 U.S. 59, 46 S. Ct. 194, 70 L.Ed. 470 (1926).

After the decision in *Jensen*, courts were hesitant to find exclusive jurisdiction under the LHWCA for fear that an employee would make a wrong choice on the coverage issue and thereby be precluded or unnecessarily hindered in seeking to redress his wrong.

However, under the facts of this case, none of the exceptions for state exercise of jurisdiction exists. Respondent, Charles R. McMaster, Jr., met both the situs and status test under the LHWCA when the Administrative Law Judge exercised jurisdiction in 1988. There have been no allegations made by respondent that state courts have jurisdiction over his cause of action except for the plain reason that he was denied benefits by the Administrative Law Judge. His injury occurred over navigable waters and he was engaged in traditional maritime activity. His is a case that clearly falls within the admiralty jurisdiction of the federal courts, and as such, state courts are without power to exercise concurrent jurisdiction over this cause of action.

Because of the very nature of admiralty jurisdiction, there must exist some compatibility between the federal sphere of exclusive jurisdiction and a state's right to exercise sovereignty over its employees and its land. However, the recognition by this Court in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S. Ct. 2432, 65 L.Ed.2d 458 (1980), that the LHWCA supplements rather than supplants state law should not necessarily lead to the conclusion that state law can validly operate in a totally federal sphere. While federal law might be called upon to yield to state law as it seeks to move admiralty, and hence exclusive, federal jurisdiction shoreward, the same is not true of state law as it seeks to expand its jurisdiction over

navigable waters. This assertion is buttressed by the constitutional mandate that federal courts would have exclusive jurisdiction over admiralty concerns and the United States Supreme Court decision in *Southern Pacific Company v. Jensen,* supra.

The United States Supreme Court, in *Davis v. Department of Labor,* 317 U.S. 249, 63 S. Ct. 225, 85 L.Ed. 246 (1942), held that harbor workers and longshoremen employed in whole or in part upon the navigable waters are clearly protected by the federal act. Since the LHWCA has carved out of state court jurisdiction those particular employees engaged in maritime employment, there can be no doubt that federal courts have exclusive jurisdiction over their claims for worker's compensation. *Flowers v. Travelers Insurance Co.,* 258 F.2d 220 (5th Cir. 1958); *Noah v. Liberty Mutual Insurance Co.,* 267 F.2d 218 (5th Cir. 1959). Employees, such as respondent, who fit into the definition of Section 902 (3) are not part of the twilight zone or shadowy area which would allow the state to exercise concurrent jurisdiction.

Plaintiff was involved in maritime employment as a ship repairer and his injury occurred on navigable water, the Mississippi River. Respondent was clearly involved in an activity that was provided for in the LHWCA. The historical view is that the instant dispute falls under exclusive federal jurisdiction. See *Flowers v. Travelers Insurance Company,* supra, and *Noah v. Liberty Mutual Insurance Company,* supra. Respondent clearly met both the situs and the status test of the LHWCA and therefore his exclusive remedy was under the Act. *Pennsylvania R. Co. v. O'Rourke,* 344 U.S. 334, 73 S. Ct. 302, 97 L.Ed. 367 (1953).

Congress has directed both in statute and legislative history that its intent was to utterly displace state law in establishing federal jurisdiction. See *33 U.S.C. Section 905.* The LHWCA, an offspring of the impeccable federal province of admiralty jurisdiction, should be allowed to remain under the protection of federal jurisdiction. It would be an affront to federal jurisdiction to allow a state, land-based worker the right to advance a claim under admiralty jurisdiction. Likewise, a claimant clearly encompassed within the LHWCA's remedial scope should not be afforded the duplicitous privilege of seeking redress in the state worker's compensation laws for an admiralty claim governed under exclusive federal jurisdiction.

Accordingly, it is submitted that respondent's exclusive remedy lies within the LHWCA and the state courts have no jurisdiction over his cause of action.

C. The Louisiana Supreme Court Decision of Logan v. Louisiana Dock Co., Inc., Supra, is Directly in Conflict with Decisions of a Federal Appellate Court and the United States Constitution:

Recently, the Louisiana Supreme Court has had the opportunity to wrestle with the question of the exclusive jurisdiction of the LHWCA in a case entitled *Logan v. Louisiana Dock Co., Inc.* The Supreme Court held that Logan's claim was cognizable under both the state worker's compensation law and the LHWCA. Louisiana, the Court stated, had concurrent jurisdiction over injuries sustained by a worker injured on a dry dock. The Supreme Court pointed out that Logan's injury occurred

on a dry dock which has historically been viewed as an extension of the land. The Court relied on *Sun Ship v. Pennsylania* supra, for the proposition that concurrent federal and state jurisdiction is permissible over land based injuries. The U. S. Supreme Court, in *Sun Ship*, supra, held that a state may apply its worker's compensation scheme to land based injuries that fall within the coverage of the LHWCA. However, *Logan* does not consider the issue at hand: whether the injury of a maritime worker located on a barge over navigable waters is subject to concurrent jurisdiction under both the state and federal compensation statutory schemes.

Unlike *Logan*, plaintiff herein was employed repairing barges located on the Mississippi River when his injury occurred, thereby bringing his action within the exclusive admiralty jurisdiction of federal courts. The reason for finding exclusive federal jurisdiction in a case such as this, is more compelling than in a case where a worker was injured on land or extensions of land but engaging in ship building or ship repair activities. Plaintiff should not be able to avail himself to any of the factual distinctions that would allow for state concurrent jurisdiction. His injury occurred on navigable waters while engaging in ship repair and therefore falls within the exclusive province of the LHWCA.

The *Logan* decision by the Louisiana Supreme Court, if allowed to stand, would lead to an unwarranted expansion of jurisdiction of the state courts over admiralty and longshoremen and harbor workers' compensation claims. The facts in the instant case concern an injury occurring on a barge located on navigable water. The *Logan* case dealt with a floating drydock which the Supreme Court

apparently chose to view as an extension of land. The Appellate Decision of the Fourth Circuit, which was reversed by the Louisiana Supreme Court, did not make that factual distinction when holding the LHWCA provided the exclusive jurisdiction for Mr. Logan's injury. If *Logan* did decide the facts of this case, then the Louisiana Supreme Court has, for all practical purposes, overruled *Southern Pacific Company v. Jensen* as pointed out in the dissenting opinion by Justice Lemmon.

The factual distinctions between the instant case and the *Logan* case are clear. Logan was a worker who the Supreme Court has determined is land based because of his employment on a drydock. Respondent was working exclusively on barges engaged in traditional maritime activities such as cleaning and repairing the vessels. The *Logan* case dealt with whether or not the states had concurrent jurisdiction over land based injuries, which this Court has already decided in *Sun Ship, Inc. v. Pennsylvania,* supra. This case would involve the determination of the issue of whether or not states have concurrent jurisdiction over a province that has up until this moment been held to be exclusively federal, i.e., those injuries involving employees as defined within the LHWCA Section 902 and injuries occurring over navigable waters, 33 U.S.C. 903 (a).

The decision of *Logan v. Louisiana Dock Co., Inc.* is directly in conflict with the law of the United States Court of Appeals for the Fifth Circuit. The *Logan* court expressly declined to follow two landmark cases of the U. S. Fifth Circuit, *Flowers v. Travelers Insurance Company,* supra, and *Noah v. Liberty Mutual Insurance Company,* supra. The *Logan* court conceded that *Flowers* was factually on all

fours with the issue presented in their case, but declined to follow it, citing *Sun Ship, Herb Welding, Inc. v. Gray, 470 U.S. 414 (1985),* and *Director, Office of Worker's Compensation Programs, U.S. Department of Labor v. Perini North River Associates,* 459 U.S. 297 (1983). The court also refused to follow prior Louisiana Court decisions such as *Ellis v. Travelers Insurance Company,* 129 So.2d 729 (La. 1986) and *Wixom v. Travelers Insurance Co.,* 357 So.2d 1343 (La. App. 4th Cir. 1978) because of their reliance on *Flowers* and *Noah.* The *Logan* decision as applied to the facts of the instant case, would seem to indicate that the decision will be read to expand state court jurisdiction further than it is constitutionally permissible. It is for those reasons that a writ of certiorari should issue to the Louisiana Supreme Court.

D. The LHWCA has Preempted State Law so Completely in this Area that it Precludes State Court Exercise of Jurisdiction Over this Cause of Action:

33 U.S.C. Section 905 (a) provides:

> The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such

> injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by Section 904 of this title.

Section 905 (a) reflects the Congressional intent that the employer's liability be exclusive under the LHWCA. In this case, respondent has filed a claim under the LHWCA and received a hearing by the Administrative Law Judge. A decision and order was rendered on May 12, 1988 (See attached Appendix D). At that time, benefits were denied and respondent has appealed the decision to the Benefits Review Board pursuant to 33 U.S.C. Section 921. Petitions for review of board orders are heard by the United States Court of Appeals, 33 U.S.C. Section 921 (C). It is clear from the completeness of the statute that Congress has intended that the entire process of adjudicating the claim and the appellate procedure would take place in the federal sphere. Respondent, apparently growing impatient with the appellate procedure provided by the LHWCA, has brought suit under the Louisiana Workers' Compensation Law. To allow such action by respondent would be a circumvention of the appellate process of the Longshoremen and Harbor Workers' Compensation Act and render Section 905 (a) meaningless.

Section 905 (a) and the appellate procedure set forth in the Act, would be severely undermined if all future claimants are allowed to first seek a federal remedy and then move into state court jurisdiction without allowing a

final word to be said by the federal courts. The Pennsylvania Superior Court in *Christman v. Dravo Corp.*, 466 At.2d 209 (Pa. Super. 1983) was faced with a similar issue and held that the Longshoremen and Harbor Workers' Compensation Act had exclusive jurisdiction over a claim brought by a widow first under the LHWCA. The widow brought suit in state court while her appeal was pending under the LHWCA in the federal forum. The Pennsylvania Court held that to allow such a circumvention of the LHWCA was not intended by Congress when it enacted Section 905 (a).

Even if there may be concurrent jurisdiction over certain types of injuries and certain types of employees, it does not follow that state court can exercise concurrent jurisdiction over a claim which has been brought first under a federal statute. The doctrine of federal preemption would also work to preclude such a result. Federal law preempts state law in three different areas: (1) when Congress explicitly expresses its intent to preempt state law; *Shaw v. Delta Air Lines*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2899, 77 L.Ed.2d 490, 500 (1983); (2) when the federal statute may be so comprehensive or pervasive that Congress' intent to displace state law may be inferred; *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1947); or (3) when state law conflicts with federal law.

Section 905 (a) expresses the clear and manifest purpose of Congress to preempt state law in this area and the exercise of dual authority would be repugnant to the Congressional objective stated in the LHWCA. Once an action is brought under the LHWCA, it is committed to the federal sphere. By allowing respondent to leave the federal sphere and bring his action under the state

worker's compensation laws at this stage would usurp the federal nature of the LHWCA intended by Congress and would place state law in direct conflict with the federal act. This is not a result that was intended by Congress, nor any court which has considered this issue. Accordingly, based upon the statutory dictates of the LHWCA of the appellate procedure, respondent is precluded from seeking a state court remedy at this point.

CONCLUSION

The lower court impermissibly denied petitioner's declinatory exception of jurisdiction and held that state court jurisdiction exists over respondent's cause of action. In doing so, the lower court contravened Article III, Section 2 of the United States Constitution and the established precedent of this Court. The lower court has also ignored federal precedent which holds the LHWCA has exclusive jurisdiction over injuries occurring over navigable waters. Because the lower court's decision conflicts with the United States Constitution, the precedent of this Court and a federal appellate court, this Court should grant a writ of certiorari to review this decision.

Respectfully Submitted:

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July 27, 1989

APPENDIX "A"

JUDGE THOMAS J. MALIK
40th Judicial District
Parish of St. John the Baptist

EXHIBIT NO. 4

[SEAL]

CHARLES R. McMASTER, JR.
VS.
ROBERT MILLER, AETNA LIFE & CASUALTY

NO. 23,643 DIVISION B
State of Louisiana
/s/ Evelyn G. Sutton
CLERK OF COURT

JUDGMENT ON EXCEPTION

(Filed January 3, 1989)

This matter came for hearing on the 13th day of December, 1988, President:

Vincent W. Farrington, Jr. for Plaintiff/Respondent
Elizabeth D. Mackay, for Mover/Defendant.

Aetna Casualty & Surety Co. has urged an exception citing a lack of jurisdiction of the Plaintiff's subject of a claim under the provisions of Title 23 (State Workmens Compensation Act.).

With the facts this court has before it, the most conclusive is a finding by the Administrative Law Judge that the Plaintiff is not entitled to benefits under the Longshore and Harbor Worker's Act. I find Defendant's exception without merit. This opinion does not, nor is it necessary, to agree or disagree with the judgment of Commissioner Glenn, I have however, through the federal findings been furnished certain facts which I find helpful to this Court.

In the present posture of this case, I am determining an exception without benefit of any depositions or sworn testimony. In Louisiana an employee need not be a part of the defendant's regular organization in order to claim compensation. This Plaintiff certainly appears to be a necessary party to Defendants ". . . course and scope of employer's trade or occupation." (See King v. American Tack Corp., 144 So. 283), thus I find sufficient presumption that Plaintiff was an employee and the exception of Aetna Casualty & Surety is dismissed.

/s/ Thomas J. Malik
JUDGE

APPENDIX "B"

Application For Writs

EXHIBIT NO. 11

No. 89-C-120

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

RECEIVED MAR 22 1989 DUPLASS, WITMAN & ZWAIN

FEB 28 1989

/s/ Glyn Rae Waguespack

Dep. Clerk

CHARLES R. MCMASTER, JR.

VERSUS

ROBERT MILLER AND ASSOCIATES, ET AL

In Re AETNA CASUALTY & SURETY COMPANY Applying for SUPERVISORY WRITS DIRECTED TO THE HONORABLE THOMAS J. MALIK, JUDGE 40th J.D.C., PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA, DIVISION "B", NUMBER 23,643

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March 21, 1989

Writ denied. The case is governed by *Logan v. Louisiana Dock Co., Inc.*, No. 88-C-1506 (La., Jan. 30, 1989) ___ So.2d ___.

/s/ LAC
CHIEF JUDGE LAWRENCE A. CHEHARDY

/s/ TCW Jr
JUDGE THOMAS C. WICKER, JR.

/s/ SG
JUDGE SOL GOTHARD

A TRUE COPY
GRETNA MAR 21 1989
/s/ Genevieve L. Venette
COURT OF APPEAL, FIFTH CIRCUIT

APPENDIX "C"

The Supreme Court of the State of Louisiana

CHARLES R. McMASTER, JR.

VS. NO. 89-CC- 0765

ROBERT MILLER AND ASSOCIATES et al

IN RE: Aetna Casualty & Surety Co.; – Defendant(s); Applying for Supervisory and/or Remedial Writs; Parish of St. John Baptist 40th Judicial District Court Div. "B" Number 23,643; to the Court of Appeal, Fifth Circuit, Number 89-CA-0120

April 28, 989

Denied.

PFC
JAD
JLD
JCW
LFC

MARCUS J., would grant the writ.

Supreme Court of Louisiana
April 28, 1989

/s/ Frans J. LaBranche, Jr.
Clerk of Court
For the Court

APPENDIX "D"

U.S. Department of Labor

[Seal]

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

In the Matter of CHARLES McMASTER Claimant against ROBERT MILLER & ASSOC. Employer AETNA CASUALTY & SURETY Carrier	)	Case No. 87-LHC-319 OWCP No. 7-103769

Vincent William Farrington, Jr., Esq.
2626 N. Arnoult Rd., Suite 200
Metairie, Louisiana 70002
For the Claimant

Gary M. Zwain, Esq.
Suite 2900
Three Lakeway Center
3838 N. Causeway Blvd.
Metairie, Louisiana 70002
For the Employer/Carrier

Before: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter "Act"). This claim is brought by Charles McMaster (hereinafter "Claimant") against Robert Miller & Associates (hereinafter "Respondent") and Aetna Casualty & Surety (hereinafter "Carrier"). The formal hearing was conducted at Metairie, Louisiana on January 22, 1988 at which time the parties were represented by counsel, afforded opportunity to present documentary evidence, examine and cross-examine witnesses, and make oral argument. This decision is based upon the entire record.[1]

After evaluating the entire record, there is sufficient evidence to support the following stipulations: (1) Claimant was injured on March 25, 1986; (2) Claimant notified Respondent of his injury on May 5, 1986; (3) Respondent filed its notice of controversion on September 5, 1986; (4) Respondent has paid no medical or compensation benefits to Claimant; (5) Claimant's average weekly wage at the time of his injury was $617.87; and (6) Claimant has not returned to his regular employment since his injury.

The unresolved issues in this proceeding are:

(1) Whether there existed an employer/employee relationship between Respondent and Claimant;

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[1] The following abbreviations will be used throughout this decision when citing the evidence of record: Claimant's Exhibit - "CX," Respondent's Exhibit - "RX", Transcript of the Hearing - "Tr.", and Court's Exhibit - "CT's."

(2) Whether §4(a) of the Act bestows liability upon Respondent for Claimant's disability;

(3) Whether Respondent filed a timely notice of controversion;

(4) Whether Claimant was injured within the course and scope of employment with Respondent;

(5) Nature and extent of Claimant's disability, if any;

(6) Penalties and attorney fees.

STATEMENT OF THE CASE

Claimant graduated from high school in 1971. Claimant originally worked in air conditioning. He then went to welding school. Claimant went to work for Z. O. Metcalf, a barge repair fleeting operation, as a welder in late 1974 or early 1975. He later worked for Federal Barge Line, a barge fleeting line, and Hamilton Fiberglass, a company subcontracting wash and repair work for Federal Barge Line and Pelican Fleeting, another barge fleeting line. When Hamilton Fiberglass left Pelican Fleeting, Claimant took over the wash, repair, and related operations. When Pelican Fleeting was sold, and the name changed to Elmwood Fleeting, Claimant left to form his own company after having worked for Elmwood about six months. At the time Claimant started his barge cleaning service, he had about 11 years experience in the cleaning, inspection, and repair of barges.

Barge fleeting lines are companies that receive loaded barges, deliver them to an elevator, pick them up when empty, clean and repair them, and secure them in tow to

go to other loadings. Claimant offered a rather unique service in that he offered a more economical alternative to barge fleeting lines. Claimant and his employees would travel to the empty barge, clean it, inspect it, and make minor repairs. By Claimant's going to the barge, the barge line would save the charges for towing.

Claimant's company worked for a number of different barge lines from August, 1985 until March, 1986. From January 6, 1986 until March 25, 1986, only 8 out of 124 barges cleaned or inspected were Respondent's barges.

Claimant would hire three to five people on a barge-to-barge basis. He would charge $300 per barge, plus more if it was a coal or a roll-top barge. If repairs were made, he would also charge for them. The price would be calculated at the end of the job. Respondent would pay Claimant, withholding no deductions for income tax or Social Security.

Claimant considered himself self-employed. He felt that he was the one responsible to maintain safety and to see that the jobs were done properly. He viewed Respondent and the other barge lines as customers to whom he was selling a service. He held himself out to those with whom he did business as the Bayou Barge Company. Claimant first did work for Respondent in 1985. In March, 1986, John R. Weber, Jr., was manager of maintenance and claims for Respondent. He testified that Robert Miller & Associates is in the business of hauling freight by barge, contracting with barge owners to manage the barges and then selling their freight hauling services to shippers. Robert Miller and Associates has ten employees

in an office in St. Louis, Missouri. They hire various fleeting services to clean and repair the barges.

On the date of his injury, Claimant was cleaning a barge for Respondent at the Mississippi River Grain Elevator in Myrtle Grove, Louisiana. He had just finished the job and was climbing out of the barge. Claimant fell from the ladder and into the barge. Dr. David W. Aiken, Jr., a physician who is board certified in orthopedic surgery, saw Claimant on the day of his injury. Claimant suffered closed, comminuted fractures of both heel bones. Dr. Aiken testified that Claimant is totally disabled from the job he was performing when injured, or any job involving climbing, long walking, or heavy carrying. He can probably do sedentary work, be a college student, or operate his own business as long as he does not walk or perform manual labor. Dr. Aiken recommended that Claimant undergo triple arthrodesis of both ankles. This operation would limit Claimant's ability to move his ankles, but it would eliminate 80-90% of Claimant's pain.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The threshhold question in this case is whether an employee-employer relationship existed between Claimant and Respondent at the time of Claimant's injury. Claimant alleges that an employee-employer relationship existed because the work performed by him was necessary and integral to Respondent's business. Respondent contends that such a relationship did not exist because Claimant was self-employed and Respondent was merely Claimant's customer.

The proper test in the Fifth Circuit for finding an employer/employee relationship is the "relative nature of the work" test. *Haynie v. Tideland Welding Service*, 631 F.2d 1242, 1243 (5th Cir. 1980); *Oilfield Safety and Machine Specialties, Inc.*, 625 F.2d 1248, 1253 (5th Cir. 1980) (hereinafter cited as *Oilfield Safety*). The test was summarized in *Oilfield Safety* as follows:

> In determining the existence of an employee-employer relationship pursuant to this test, one examines the nature of the claimant's work in relation to the regular business of the employer. This examination must focus on two distinct areas: [A] the nature of the claimant's work and [B] the relation of that work to the alleged employer's regular business. In evaluating [A] the character of a claimant's work, a court should focus on various factors, including the skill required to do the work, the degree to which the work constitutes a separate calling or enterprise, and the extent to which the work might be expected to carry its own accident burden. In analyzing [B] the relationship of the claimant's work to the employer's business the factors to be examined include, among others, whether the claimant's work is a regular part of the employer's regular work, whether the claimant's work is continuous or intermittent, and whether the duration of claimant's work is sufficient to amount to the hiring of continuing services as distinguished from the contracting for the completion of a particular job.

Oilfield Safety, 625 F.2d at 1253. For the reasons described below, the Court finds that Claimant is not an employee of Respondent under the Act.

Claimant was in the business of cleaning, inspecting, and repairing barges, work typically performed by barge fleeting companies. Respondent is a barge line in the business of hauling freight. Claimant's business's small

size alone does not make it any less of a separate enterprise from Respondent than any other fleeting company. These distinct types of companies would generally be viewed as separate business enterprises expected to carry their own accident burdens.

Claimant's work is not highly skilled. Neither does it require special equipment other than buckets, brooms, ropes, gloves, ladders, and shovels. However, the Court finds that this does not outweigh the fact that barge fleeting companies and barge lines are distinctly separate enterprises. Therefore, the Court finds that the nature of Claimant's work indicates that Claimant is not an employee of Respondent.

Likewise, the Court finds that the relation of that work to the Respondent's regular business also indicates that Claimant is not an employee of Respondent. Claimant testified that he considered Respondent to be one of his many customers. Respondent paid Claimant without withholding income tax or social security. Claimant paid self-employment taxes on his income. Claimant paid his own employees. Claimant's business and Respondent treated each other as distinct and separate business entities. In addition, Claimant's work for Respondent was intermittent and insufficient to constitute the hiring of continuing services.

Even though the Court finds that Claimant is not an employee of Respondent under the Act, Section 4(a) provides "[i]n the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation." 33

U.S.C. 904(a)(1988). Claimant contends that he did not secure the payment of compensation and also that he was a subcontractor of Respondent. Therefore, he argues, Respondent is still liable to him for compensation.

However, Claimant is not an employee of himself or his business. Claimant's business is a sole proprietorship. A person cannot be both employer and employee under the Act. *Duncan v. D & K Foreign Auto Repair*, 17 BRBS 40, 41 (1985). In the case of general partnerships and sole proprietorship, the dual capacity doctrine does not apply because the business is not a separate legal entity. *Duncan*, 17 BRBS at 42. Therefore, Claimant cannot recover from Respondent under §4(a) of the Act because he cannot be an employee of a subcontractor under the Act.[2]

Based on the foregoing findings of fact, conclusions of law, and the entire record, the Court enters the following Order.

ORDER

It is hereby ORDERED, ADJUDGED and DECREED that the claim for benefits filed by Charles McMaster is hereby DENIED.

Entered this 19th day of May, 1988, at Metairie, Louisiana.

/s/ James W. Kerr, Jr.
JAMES W. KERR, JR.
Administrative Law Judge

JWK:dgc
d/16

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[2] The Court specifically refrains from deciding whether claimant is a subcontractor under §4(a) of the Act.

CERTIFICATE OF FILING AND SERVICE

I certify that on May 24 1989 the foregoing Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Charles McMasters, 2225 Yorktowne Dr., LaPlace, La 70068
Claimant

Robert Miller and Associates, 7980 Clayton Rd., Suite 211, St. Louis, MO 63117
Employer

Aetna Casualty and Surety, P. O. Box 6001, Metairie, LA 70009
Insurance Carrier

Vincent Farrington, Jr., Esq., 2626 N. Arnoult Rd., Suite 200, Metairie, LA 70002
Attorney for Claimant

Gary M. Zwain, Esq., 3838 N. Causeway Blvd., Suite 2900, Metairie, LA 70002
Attorney for Employer/Insurance Carrier

A copy was also mailed by regular mail to the following:

Judge James W. Kerr, Jr., Office of the Administrative Law Judges, U. S. Department of Labor, Heritage Plaza, Suite 530, 111 Veterans Memorial Boulevard Metairie, Louisiana 70005

/s/ Donnette S. Glenn
DONNETTE S. GLENN
Deputy Commissioner

Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS
ADMINISTRATION
Office of Workers' Compensation Program

APPENDIX "E"

U. S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

CHARLES MCMASTER,		
Claimant	*	
VERSUS	*	
ROBERT MILLER & ASSOCIATES,	*	CASE NO.: 87-LHC-319
Employer	*	OWCP NO.: 7-103769
AETNA CASUALTY & SURETY,	*	
Carrier	*	

NOTICE OF APPEAL

TO: Ms. Linda M. Meekins
Clerk of Benefits Review Board
U. S. Department of Labor
Room 757
Van Guard Building
1111 20th Street, N. W.
Washington, D. C. 20036

Honorable James W. Kerr, Jr.
Administrative Law Judge
U. S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Boulevard
Metairie, Louisiana 70005

Mr. Gary Zwain
Attorney at Law
Three Lakeway Center
Suite 2900
3838 N. Causeway Boulevard
Metairie, Louisiana 70002

Mr. Charles McMaster
2225 Yorktowne Drive
Laplace, Louisiana 70068

Robert Miller and Associates
7980 Clayton Road
Suite 211
St. Louis, Missouri 63117

Ms. Donnette S. Glenn
Deputy Commissioner
U. S. Department of Labor, OWCP
Longshore and Harbor Workers
701 Loyola Avenue, Room 13032
New Orleans, Louisiana 70113

NOTICE IS HEREBY GIVEN that claimant, Charles R. McMaster, Jr., hereby appeals to the Benefits Review Board, U. S. Department of Labor, from the Decision and Order denying benefits issued by the Administrative Law Judge, James W. Kerr, Jr. on May 27, 1988, which Decision and Order denying benefits was filed with the Deputy Commissioner, Seventh Compensation District, on May 24, 1988.

On May 27, 1988, the claimant, Charles R. McMaster, Jr., filed a Motion for Reconsideration of the said Decision and Order denying benefits. A Decision and Order denying benefits upon said motion was rendered by Administrative Law Judge Kerr on June 23, 1988 and said Decision and Order was filed in the Office of the Deputy Commissioner, Seventh Compensation District on June 29, 1988.

RESPECTFULLY SUBMITTED:

/s/ Vincent W. Farrington, Jr.
VINCENT W. FARRINGTON, JR.
2626 North Arnoult Road
Suite 200
Metairie, Louisiana 70002
Telephone: (504) 885-7311

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record, by placing same in the U. S. Mail, properly addressed and postage prepaid, this 8th day of July, 1988.

/s/ Vincent W. Farrington, Jr.
Vincent W. Farrington, Jr.

APPENDIX "F"

40TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. JOHN

STATE OF LOUISIANA

NO.: 23643 DIVISION "B" DOCKET NO.:

CHARLES R. McMASTER, JR.

VERSUS

ROBERT MILLER AND ASSOCIATES and AETNA LIFE & CASUALTY

FILED: _____ _____

DEPUTY CLERK

PETITION FOR WORKER'S COMPENSATION BENEFITS

(Filed September 15, 1989)

The Petition of Charles R. McMaster, Jr., domiciled in the Parish of St. John, State of Louisiana, respectfully represents that:

I.

Made defendants herein are:

(a) Robert Miller and Associates, Inc. (hereinafter referred to as "Miller"), a foreign corporation doing business within this State.

(b) Aetna Casualty and Surety Company, a foreign insurance company authorized to do and doing business in the State of Louisiana.

II.

At all material times herein, Aetna Casualty and

Surety Company (hereinafter referred to as "Aetna") was the worker's compensation insurer of Miller and is liable in solido with the said defendant on the cause of action hereinafter stated.

III.

On March 25, 1986, the plaintiff was employed by Miller to clean a barge, which was located in Myrtle Grove, Louisiana at the Mississippi Grain Elevator.

IV.

On the aforementioned date, the plaintiff fell into the barge from a ladder and suffered severe injuries to both his left and right heels. The plaintiff was working for Miller as an independent contractor doing manual labor at the time of the accident and was performing his duties within the course and scope of his employment with Miller.

V.

As a result of the accident and injury, the plaintiff has been disabled from any type of work. The defendants have not paid any compensation nor medical benefits to the plaintiff.

VI.

The plaintiff has incurred medical expenses and may have to undergo surgery in the future, for which defendants should be held responsible.

VII.

Defendant and its insurer were duly notified of this accident and were furnished satisfactory proof of loss.

VIII.

The plaintiff's earnings for the 26-week period prior to the date of the accident were $22,993.75. The plaintiff avers that he is entitled to the maximum compensation rate allowable.

IX.

As a result of plaintiff's accident, the plaintiff filed a claim under the Longshore and Harbor Workers' Compensation Act. The claim proceeded to a formal hearing at which the plaintiff was denied benefits.

WHEREFORE, plaintiff prays that:

1. Defendants, Robert Miller and Associates, Inc. and Aetna Casualty and Surety Company, be duly cited and served with a copy of this Petition and that, after due proceedings are had, there be judgment herein in favor of the plaintiff, Charles R. McMaster, Jr., and against the defendants, declaring the plaintiff to be totally disabled;

2. Plaintiff have judgment against the defendants for all past, present and future compensation benefits and medical expenses with legal interest from the date of judicial demand until paid;

3. Plaintiff have judgment against the defendants for penalties, attorney's fees and costs of this litigation as provided by law.

RESPECTFULLY SUBMITTED:

/s/ Vincent W. Farrington, Jr.
VINCENT W. FARRINGTON, JR.
2626 North Arnoult Road
Suite 200
Metairie, Louisiana 70002
Telephone: (504) 885-7311

STATE OF LOUISIANA

PARIS OF JEFFERSON

BEFORE ME, personally came and appeared Charles R. McMaster, Jr., who after being duly sworn did state that he has read the foregoing Petition and that all of the allegations of fact contained therein are true.

/s/ Charles R. McMaster, Jr.
CHARLES R. McMASTER, JR.

Sworn to and subscribed
before me, this 9th
day of September, 1988.

/s/ Vincent W. Farrington, Jr.
NOTARY PUBLIC

PLEASE SERVE:

Robert Miller and Associates
7930 Clayton Road
Suite 211
St. Louis, Missouri 63117
Through the Louisiana Longarm Statute

Aetna Casualty and Surety Company
Through the Secretary of State,
Walter Fox McKeithen

A TRUE COPY

DEPUTY CLERK OF COURT
40th JUDICIAL DIST. COURT
PARISH OF ST. JOHN THE BAPTIST, LA.